STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7440

Petition of Entergy Nuclear Vermont Yankee, LLC, and	)
Entergy Nuclear Operations, Inc., for amendment of	)
their Certificates of Public Good and other approvals	)
required under 10 V.S.A. §§ 6501-6504 and 30 V.S.A.	)
§§ 231(a), 248 & 254, for authority to continue after	)
March 21, 2012, operation of the Vermont Yankee	)
Nuclear Power Station, including the storage of spent-	)
nuclear fuel –	)

Order entered: 3/29/2012

ORDER RE ENTERGY VY MOTION SEEKING FINAL DECISION AND OTHER PROCEDURAL ISSUES

I. INTRODUCTION AND PROCEDURAL HISTORY

On January 20, 2012, the United States District Court for the District of Vermont entered a Decision and Order in *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. v. Shumlin et al*, Docket No. 1:11-cv-99 (the "District Court Decision").

On January 31, 2012, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy VY"), filed with the Public Service Board ("Board") a Motion Seeking Issuance of a Final Decision and Order Granting CPG ("Motion for Final Decision"). Entergy VY asks that the Board "issue a final decision and order on Entergy VY's petition in this docket." Entergy VY states that it is filing the motion in light of the District Court Decision.

On February 1, 2012, the Board issued a memorandum requesting that parties file responses to Entergy VY's motion by March 2, 2012.

On February 14, 2012, the Board issued a notice of a status conference to be held on March 9, 2012.

On February 22, 2012, the Board issued a memorandum identifying additional, procedural issues to be addressed in the parties' March 2 responses. Subsequently, in an Order issued on March 1, 2012, the Board extended the deadline to March 7, 2012, for responses to the February 22 memorandum.

On March 9, 2012, the Board held the status conference as scheduled. Among the issues discussed at the status conference were the extent to which the Board could rely upon the existing record in this docket, and the proper scope of review for this docket in light of the District Court Decision. At the status conference, the Board also established a deadline of March 16, 2012, for additional responses to the issues discussed at the status conference and for reply comments to other parties' responses to the Board's February 22 memorandum. The Board further established a March 20, 2012, deadline for replies to the March 16 submissions.

Between February 6 and March 20, 2012, parties filed numerous responses and comments regarding Energy VY's Motion for Final Decision, the Board's February 22 memorandum, and the issues discussed at the status conference.

II. DISCUSSION AND CONCLUSIONS

Reliance upon Existing Record

We begin by addressing the extent to which we should rely on the existing record, for that determination informs our ruling on Entergy VY's Motion for Final Decision.

Most of the parties recommend that the Board create a new record, rather than try to "cleanse" the existing record, due to the expected burden involved in reviewing the extensive existing record for potentially objectionable material and due to the possibility that some objectionable material might remain that could taint the Board's ultimate decision.

In its filings in this docket, Entergy VY has stated a preference for maintaining the existing record, but acknowledges that starting over with a new record may have advantages.[1] In comments filed on March 16, 2012, Entergy VY states:

1. Starting over with a new record is consistent with the position that Entergy VY took in the federal litigation, in which it told the federal District Court judge that to do so would be "the safer course." Entergy VY March 7, 2012, Responses (filed in PSB Docket 7440) at 5–6.

> Entergy VY respectfully submits that the Board should keep the existing record and allow the parties an opportunity to designate which parts of that record should be disregarded, but Entergy VY acknowledges that starting anew could potentially be more efficient and that the Board has particular expertise on which mode of proceeding will be most efficient and most responsive to the Board's needs.[2]

After carefully considering the parties' comments, we conclude that the better course of action is to create a new record. We reach this conclusion for three primary reasons. First, it would likely be overly burdensome on the parties and the Board to review thoroughly the existing record for evidence that should be struck and, potentially, to litigate which of that evidence should in fact be struck.

Second, the current evidentiary record includes inaccurate information that Entergy VY previously provided regarding underground piping at the Vermont Yankee Nuclear Power Station ("Vermont Yankee"). On January 27, 2010, the Board convened a status conference in response to a letter from the DPS stating that Entergy VY had not provided accurate information regarding underground pipes at the VY plant. At that status conference the Board did not establish a schedule for resolving the issues raised by the inaccurate information, because the Department of Public Service ("Department") needed time to identify the additional work necessary to evaluate the newly revealed underground piping system.

On June 9, 2010, having heard nothing further from the parties regarding a schedule, the Board issued a memorandum asking the parties about the status of efforts to develop a schedule. On June 23, 2010, the Department filed a letter stating that, after consulting with the other parties:

> . . . *it is the consensus of the parties* that we should not create a schedule at this time. . . . Once Entergy VY has informed the Board and the parties of the end date for the completion of the verification process, *the parties will work together to propose a new schedule and will move to reopen the record*. . . . the other clear direction from the parties was that when we do build the schedule, there should be sufficient time for posing discovery, preparing responses, and writing testimony. The parties will attempt to incorporate these values into future schedules in this docket.[3]

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2. Entergy VY March 16 Comments at 10–11.
3. Department letter filed June 23, 2010, at 1 (emphasis added).

On July 25, 2010, Entergy VY filed a letter informing the Board and the parties that it would complete the process of verifying the record and discovery responses, and fulfilling any unfulfilled commitments, by September 15, 2010. On September 15, 2010, Entergy VY filed three letters, and on September 30, 2010, filed two letters, which together indicate that Entergy VY had completed reviewing: (1) discovery responses of non-company witnesses; (2) testimony, exhibits and discovery responses of employees of Entergy VY and its affiliates; and (3) responses to document requests from Nuclear Safety Associates. However, the parties never proposed a new schedule or moved to reopen the record. Thus, the evidentiary record in this docket still contains the inaccurate information that was provided by Entergy VY, and parties have not had the opportunity to conduct discovery and submit testimony related to the incorrect information.

Third, as many of the parties have observed, the existing record in this docket is stale. The evidentiary hearings were held in May and June, 2009, with some of the prefiled testimony dating back as far as March of 2008. The evidentiary record does not reflect potentially relevant developments subsequent to the completion of evidentiary hearings, such as leaks from underground piping at Vermont Yankee, and changes in power-market prices that may affect the value of the revenue-sharing agreement. Thus, not only has there been no progress in correcting the record, but also even the evidence unaffected by Entergy VY's misinformation is now several years' old.

Several parties have recommended that, even if we start a new record, parties should be allowed to seek to reintroduce portions of the existing evidentiary record into the new record. This appears to be a reasonable proposal, and we anticipate that it would be allowed. However, the specific details must be identified for how it would be accomplished in the course of developing the new record; we expect the parties to propose those details for the Board's consideration.[4]

As described below, in today's Order we establish procedures designed to develop an adequate record and, more generally, to move this matter efficiently toward final resolution.

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4. The details would presumably include, for example, any deadlines for proposing the incorporation of existing evidence and for objections (which might correspond to the deadlines for prefiled testimony and objections thereto), discovery practice (if any) related to such evidence, and whether a sponsoring witness must be presented at a hearing if he or she has already been subjected to cross-examination on the incorporated testimony or exhibit.

Entergy VY Motion for Final Decision

We deny Entergy VY's Motion for Final Decision because we do not have an appropriate record on which to base a decision. As many of the parties including Entergy VY have noted, the existing record is stale and may include evidence that the Board is precluded from considering in light of the District Court Decision. Furthermore, the existing record includes Entergy VY's incorrect evidence regarding underground pipes. Therefore, the existing record needs to be corrected and, to the extent appropriate, updated as a result of the misinformation that Entergy VY had presented on the issue of underground pipes.[5]

Because of these deficiencies in the record, we deny Energy VY's Motion for Final Decision.

Scope of this Proceeding

Two related questions regarding the scope of this proceeding must be addressed as this matter moves forward: (1) what state-law approvals is Entergy VY now seeking from the Board in this docket; and (2) what otherwise-relevant evidence is the Board unable to consider due to federal preemption?

Both of these questions are informed, in part, by the District Court Decision, which concluded that Act 160 (P.A. No. 160, 2006 Vt., Adj. Sess.) is preempted, as is the single sentence in 10 V.S.A. § 6522(c)(5) that provided, "Storage of spent nuclear fuel derived from the operation of Vermont Yankee after March 21, 2012 shall require the approval of the general assembly under this chapter." The District Court also awarded Entergy VY related permanent injunctive relief, and permanent injunctive relief prohibiting the issuance of a new or renewed CPG conditioned on below-wholesale-market sales to Vermont utilities. The District Court Decision followed United States Supreme Court precedent from *Pac. Gas & Electric Co. V. State Energy Res. Conserv. & Dev. Comm'n,* 461 U.S. 190 (1983) ("*Pacific Gas*") in finding that states are preempted from regulating the radiological safety aspects of the construction and operation of a nuclear power plant. The District Court also noted that its decision does not "purport to define

5. As noted above, the parties, including Entergy VY, were supposed to have proposed a new schedule and the reopening of the record, but never did so.

or restrict the State's ability to decline to renew a certificate of public good on any ground not preempted or not violative of federal law . . . ."[6]

The parties generally agree that, following the District Court Decision, the primary focus should be on the issuance of a Certificate of Public Good under 30 V.S..A. § 231. The parties disagree on the extent to which the Board may consider certain issues.

The Board has previously acknowledged federal preemption of radiological safety concerns, as well as the ability of the state to continue to regulate with respect to non-preempted matters. In Docket No. 7082, in which the Board reviewed Entergy VY's proposal to construct a dry fuel storage facility at Vermont Yankee, the Board explained the breadth and limits of this federal preemption:

> We agree with Entergy VY that federal law places limitations on the state's jurisdiction. The federal government has exclusive jurisdiction over radiological safety concerns (except for enumerated areas expressly ceded to the states, such as the authority to regulate the air emission of radiation). The United States Supreme Court found that this jurisdiction over radiological safety is considered to occupy the entire field. In addition, the Nuclear Regulatory Commission ("NRC") "was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials" and "[u]pon these subjects no role was left for the states." Finally, under traditional preemption principles, our jurisdiction over nuclear power plants is limited when it directly conflicts with federal jurisdiction exercised by the NRC or would frustrate the purposes of the federal regulation.
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> Nonetheless, Entergy VY's characterization of the extent of federal preemption is overbroad. Supreme Court precedent explicitly states that the regulation of nuclear facilities is one of dual jurisdiction, with states retaining significant authority. The Supreme Court has observed that Congress:
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> > intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that States retain their traditional responsibilities in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.
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> These other areas of state authority encompass traditional state concerns such as land use. This dual regulatory scheme, extends even to matters related to nuclear materials, notwithstanding the broad preemption. The *PG&E* decision notes that

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6. District Court Decision at 4.

federal law explicitly preserves state authority to regulate these activities for other purposes:

> Nothing in this section shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards.

The Supreme Court's ruling and federal law thus reserves substantial jurisdiction to the state of Vermont over nuclear facilities and the dry fuel storage facility, so long as we are not regulating radiological safety and are acting within the areas of traditional state concern. These areas encompass the criteria in 30 V.S.A. § 248 and 10 V.S.A. § 6522(b). State authority remains unless in direct conflict with federal requirements.[7]

In Docket No. 6545, the Board reviewed Entergy VY's initial purchase of Vermont Yankee and the issuance to Entergy VY of a Certificate of Public Good under 30 V.S.A. § 231. In its initial brief in that proceeding, Entergy VY addressed the criteria that would apply to a future proposed extension of its Section 231 CPG:

> As to the particular criteria the Board would consider in the CPG extension case, ENVY anticipates that the Board would review renewal of the CPG under the standard of "general good of the state" set forth in 30 V.S.A. §§ 201 and 231, as that standard would apply to the action for which approval is being sought, i.e., extension of ENVY's authority to operate the VY Station. ENVY cannot predict at this time what may be encompassed by that standard in 2012, but believes it is a flexible standard that would include the relevant factors under 30 V.S.A. § 248.
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> Because 30 V.S.A. § 248 by its terms applies to the construction of generators, Entergy expects that many of its factors dealing with environmental and aesthetic impacts would not apply. Other factors would be more relevant to the extension of authority to operate the VY Station, including §(b)(2) (is required to meet the need for present and future demand for service), §(b)(3) (will not adversely affect system stability and reliability), §(b)(4) (will result in an economic benefit to the state and its residents), and (b)(7) (is in compliance with the Department's 20-year plan). Keuter supp. pfd. at 4. To the extent that ENVY and VYNPC and/or the VT Sponsors are successful in entering into a long-term power purchase agreement, that will be examined in light of these criteria as well.
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> While acknowledging that some of the § 248 criteria may be relevant in the future license extension case, ENVY does not believe that a specific scope of review should be established now as a condition of the final Order in this case. Rather the Order should note ENVY's acceptance of the "general good of the state" as the applicable standard. The Board has shown flexibility in applying

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7. Docket No. 7082, Order of 4/26/06 at 15–16 (citations omitted).

> 30 V.S.A. § 231 to address the particular activities in which an applicant proposes to engage. See e.g., Petition of New England Power Company, et al., Docket No. 6039 (Order Entered 6/29/98). ENVY expects that any review in the future will encompass all relevant factors – that are not clearly preempted – that exist at that time under the rubric that the continued operation must promote the general good of the State.[8]

In light of the District Court Decision, the U.S. Supreme Court's holding in *Pacific Gas*, and Entergy VY's acknowledgment in Docket 6545 of the scope of proper review for a renewed CPG under Section 231, we conclude that, as a general matter, we may consider any non-radiological-health-and-safety matters that bear upon the general good of the state and that do not directly conflict with the Nuclear Regulatory Commission's exercise of its federal jurisdiction or frustrate the purposes of the federal regulation. We further conclude that it makes little sense for us to attempt at this time to rule more specifically on what evidence lies properly within the non-preempted scope of our review under state law. Instead, we will reserve such rulings until we have both a clear statement from Entergy VY specifying precisely what approvals it seeks from this Board and the bases for those approvals, and the specific evidence that the parties seek to introduce.

Given these considerations, the most sensible and efficient process for moving forward is for Entergy VY to file an amended petition that identifies the specific approval or approvals that it is seeking from the Board, and the state-law authority under which the Board would issue each approval that Entergy VY seeks. Entergy VY must file its amended petition by April 16, 2012.

Because we have determined that we should create a new record, we will open a new docket in which to consider Entergy VY's amended petition. We have tentatively identified May 2, 2012, as the date for a prehearing conference in the new docket, to be confirmed in a subsequent notice. Any party to the current docket will be allowed to be a party to the new proceeding, but must file a statement confirming its intention to remain a party and a notice of appearance. We will establish a deadline for those statements at the prehearing conference.

We recognize that Entergy VY relies on its pending petition in this docket in contending that under 3 V.S.A. § 814(b) it is entitled to continue to operate past March 21, 2012. On

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8. Entergy VY Initial Brief, Docket 6545, May 7, 2002, at 14–15.

March 19, 2012, we issued an Order Re Entergy VY Motion For Declaratory Ruling denying Entergy VY's request for certain declaratory rulings, including a requested ruling that "Pursuant to 3 V.S.A. § 814(b), the Vermont Yankee Nuclear Power Station ('Vermont Yankee') may continue operating, and storing spent nuclear fuel derived from such operation, while its petition for a new or amended certificate of public good remains pending." To the extent that Entergy VY has any entitlement under Section 814(b) to continue operation of Vermont Yankee, the requirement in today's Order that Entergy VY file an amended petition, and our opening a new docket to consider the amended petition, are not intended to negate such rights.

III. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. Entergy VY's Motion for Final Order is denied.

2. By April 16, 2012, Entergy VY shall file an amended petition that identifies the specific approval or approvals that it is seeking from the Board, and the state-law authority under which the Board would issue each approval that Entergy VY seeks. A new docket shall be opened to consider Entergy VY's amended petition.

Dated at Montpelier, Vermont, this 29th day of March, 2012.

s/ James Volz	)	
	)	PUBLIC SERVICE
	)	
s/ David C. Coen	)	BOARD
	)	
	)	OF VERMONT
s/ John D. Burke	)	

OFFICE OF THE CLERK

FILED: March 29, 2012

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)